Trial Brief

April 10, 2012

Re: Even family court judges must have either pleadings or trial by consent to grant relief.

At least in the Houston area, family court judges cannot grant relief without either pleadings asking for that relief or trial by consent on the issue. The Fourteenth Court of Appeals in *Baltzer v. Medina,* 240 S.W.3d 469, 746 (Tex. App.— Houston [14th Dist.] 2007, no pet.) held that a trial court abused its discretion in modifying a joint managing conservatorship and in appointing the father the sole managing conservator because the father had not requested that relief in his pleadings. In *Baltzer,* this court stated:

> *In her fourth issue, Lynne contends the trial court abused its discretion in modifying the joint managing conservatorship and in naming Larry the sole managing conservator because Larry never requested this relief. The Texas Rules of Civil Procedure applicable to the filing of an original lawsuit apply to Larry's petition to modify. See Tex. Fam. Code Ann. 156.004 (Vernon 2002). Therefore, the trial court's judgment must conform to the pleadings; however, if issues not raised by the pleadings are tried by express or implied consent of the parties, these issues shall be treated as if they had been raised by the pleadings.*
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> *Although Larry requested certain exclusive rights in his petition to modify, the trial court was free to grant Larry these exclusive rights while, at the same time, ordering Larry and Lynne to remain as joint managing conservators. Larry did not seek to be appointed sole managing conservator in his petition. During direct examination at trial, Larry testified that he wanted certain exclusive rights, without referring to the right to be sole managing conservator. Larry then stated that he wanted all other rights to be shared. Larry never requested the trial court to appoint him as sole managing conservator. To the contrary, through this testimony, Larry expressly requested that the conservatorship be shared. Thus, the issue of sole managing conservatorship was not tried by consent of the parties. Therefore, the trial court erred in granting Larry relief that he did not request in his petition. We conclude the trial court erred in naming Larry as sole managing conservator and in not continuing the conservatorship with Larry and Lynne serving as joint managing conservators. Accordingly, we sustain Lynne's fourth issue.*
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> (Case citations omitted). 240 S.W.3d at 476.

The Houston First Court of Appeals has also held that there must be pleadings or trial by consent in order to grant relief in a child custody case. *In re Sanner*, No. 01-09-00001-CV, 2010 WL 2163140, at *17 (Tex. App.— Houston [1st Dist.] May 20, 2010, no pet.) (mem. op.)("without proper pleadings, the trial court exceeded its authority by modifying and reforming some of the conservatorship and possession provisions of its prior orders..."); *Binder v. Joe*, 193 S.W.3d 29, 32-33 (Tex. App.— Houston [1st Dist.] 2006, no pet.) (trial court erred in naming parent sole managing conservator when his pleadings did not

request that relief in restricted appeal from default judgment).

Numerous other courts have also concluded in family law cases that relief not requested in pleadings and not tried by consent cannot be granted. See e.g. *In re A.B.H. and L.N.H.*, 266 S.W.3d 596, 600-01 (Tex. App.— Fort Worth 2008, no pet.)(error for trial court to grant modification and appoint father sole managing conservator when father's pleadings did not seek that relief and the issue was not tried by consent). *Teel v. Shifflett*, 309 S.W.3d 597,602-03 (Tex. App.—Houston [14th Dist.] 2010, pet. denied)(error for trial court that granted protective order to find that the parties were "intimate parties" when the relief was not requested in the petitioner's pleadings); *In re S.A.A.*, 279 S.W.3d 853, 856 Tex. App.— Dallas 2009, no pet.)(trial court erred in granting divorce on grounds of adultery when adultery was not plead or proven, stating, "A court's jurisdiction to render judgment is invoked by pleadings, and a judgment unsupported by pleadings is void."). *Moneyhon v. Moneyhon*, 278 S.W.3d 874, 878-9 (Tex. App.— Houston [14th Dist.] 2009, no pet.)("petition must give fair and adequate notice of the claims being asserted..." and it was error to grant relief based on breach of fiduciary duty when that claim was not plead or tried by consent).

The San Antonio Court of Appeals in a memorandum decision, *In re M.B.B-Y.*, No. 04-10-00541-CV, 2011 LEXIS 2520, (Tex. App.—San Antonio, April 6, 2011, no pet.) (mem. op.) stated:

> *"Texas is a 'fair notice' state, which means that all parties are entitled to fair notice of a claim." The Texas Family Code specifically requires parties to include in their pleadings a "statement describing what action the court is requested to take concerning the child and the statutory grounds on which the request is made." Tex. Fam. Code Ann. § 102.008(a)(10) (West 2008). Without proper pleadings and evidence, a trial court exceeds its authority if it modifies or reforms previous orders affecting the custody of a child.*
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> (Case citations omitted).

Old fogeys and those without the ability to determine if cases have been overruled or bypassed by changes to the Texas Family Code might cite *Leithold v. Pass*, 413 S.W.2d 698 (Tex. 1967) and its progeny which appear to apply very relaxed (or even non-existent) pleading requirements in child custody cases. An example of this old line of cases said,"... the paramount concern is the best interest of the child, and the niceties of the procedural rules of pleading will not be used to defeat that interest." *Boriack v. Boriack*, 541 S.W.2d 237, 242 (Tex. Civ. App.—Corpus Christi 1976, writ dismissed) (trial court did not err in ordering wife to pay child support even though pleadings did not request support). The Houston Fourteenth Court of Appeals, in the *Baltzer* decision, has already addressed this argument in Footnote No. 5:

> *In Leithold v. Plass, the Texas Supreme Court held that the petitioner's pleadings for modification were sufficient. See 413 S.W.2d 698, 701 (Tex. 1967). This case predated the enactment of the Texas Family Code, and it is not clear what issue was presented regarding the petitioner's pleading. See id. It appears that respondent argued that petitioner's pleading was insufficient to request a modification of visitation rights because petitioner requested that he be given "custody and control" of his son rather than "visitation." See id. The Texas Supreme Court held that*

petitioner's pleading was sufficient. See id. In this case the high court did not hold that the civil procedure rules regarding pleadings and judgments do not apply to cases involving custody of minor children. See id. Even if it had so held, the enactment of section 156.004 of the Texas Family Code would supersede this holding.

240 S.W.3d at 469 (footnote 5).

Before the Texas Family Code, child custody cases were decided on principles of equity and the very strict pleading rules followed in other civil cases did not apply. It took some time after the adoption of the Texas Family Code in 1969 for judges and attorneys to realize that the rules had changed. Regarding suits affecting the parent child relationship, Texas Family Code Sec. 105.003 (a) says,"Except as otherwise provided by this title, proceedings shall be as in civil cases generally." Regarding modification suits, Section 156.004 states, "The Texas Rules of Civil Procedure applicable to the filing of an original lawsuit apply to a suit for modification under this chapter." Clearly, the Texas Rules of Civil Procedure require either pleadings or trial by consent in order to grant relief. Tex. R. Civ. Proc. 301 ("A trial court's judgment shall conform to the pleadings").

Aside from the fact that the Texas Rules of Civil Procedure apply in family law cases and those rules require pleadings to state the relief being sought, it would be fundamentally unfair to expect a parent to know he or she needs to present evidence about an issue when the other parent's pleadings do not ask for that relief.

As noted in the cases above, if an issued is tried by consent, then pleadings asking for that relief are not required. Trial by consent means more than just mentioning a topic, it involves actually asking for the relief in court and providing some evidence supporting that request. As one court said:

Trial by consent is intended only in the exceptional case where the record clearly reflects the parties' trial of an issue by consent. The doctrine should be applied with care and in no event in a doubtful situation. The question for the court is whether the record shows evidence of " trial of the issue" as opposed to evidence of the issue.

In re S.A.A., 279 S.W.3d 853, 856 (Tex. App.—Dallas 2009, no pet.)(citations omitted)(error to grant divorce based on husband's adultery when wife did not plead adultery and did not provide any proof of his adultery)

Another court of appeals summarized how to show trial by consent:

The unpleaded issue may be deemed tried by consent when the evidence on the issue is developed without objection under circumstances indicating both parties understood the issue was being contested. An issue is not tried merely because there is evidence on the issue, but can be deemed tried by consent when both parties present conflicting evidence on the subject. On the other hand, an issue is not tried by consent when the evidence relevant to the unpleaded issue is also relevant to a pleaded issue because admitting that evidence would not be calculated to elicit an objection and its admission ordinarily would not prove the parties' " clear intent" to try the unpleaded issue.

Hampden Corp. v. Remark, Inc., 331 S.W.3d 489, 496 (Tex. App.—Dallas 2010, pet. denied.)(citations omitted).

One way in family law cases to try a case by consent is for one party to introduce a written request for relief as an exhibit as a shorthand summary of the relief requested. Once the party testifies without objection that he or she thinks all the relief on this list is in the best interests of the child, the unplead matters may well then be before the court. The opposing attorney should object to those specific items of relief that are not plead for and tell the judge, "I want to make sure Your Honor that we are not trying these issues by consent."

The attorney who realizes just before trial or even during trial that she has not plead for some specific relief her client wants, can file a motion for leave to amend her pleadings. Leave of court is required to amend pleadings less than seven days before trial or after the deadline to amend in a pretrial order. Tex. R. Civ. Proc. 63, *Roskey v. Continental Casualty Co.*, 190 S.W.3d 875, 881 (Tex. App. – Dallas 2006, pet. denied). Rule 63 requires the amendment made less than seven days before trial to be granted, "...unless there is a showing that such filing will operated as a surprise to the opposite party." The party opposing an amendment after the deadline set in a pretrial order must also show "surprise." *Brown v. State*, 984 S.W.2d 348, 350 (Tex. App.—Fort Worth 1999, pet. denied). A party can asked to amend her pleadings <u>during</u> trial if there is an objection that the evidence offered is not supported by the pleadings. The trial court must grant the trial amendment unless the opposing party shows surprise or prejudice. Tex. R. Civ. Proc. 63, 66. A party can even ask to amend pleadings <u>after</u> the trial as long as it is done before the judgment is signed. *Greenhalgh v. Service Lloyds Ins.*, 78 S.W.2d 938, 939-40 (Tex. 1990).

A party must make a written or oral motion to amend pleadings and offer a written amendment or orally dictate the amendment into the record. Tex. R. Civ. Proc 63, 67; *McDuffee v. Miller*, 327 S.W.3d 808, 813 (Tex. App.—Beaumont 2010, no pet.)(trial court allowed attorney to dictate trial amendment to the court reporter).

The attorney who opposes the relief that was not plead for must object every time the relief is mentioned and specifically complain that the relief is not supported by the pleadings. When the proponent of the unplead relief asks the court to amend his or her pleadings, object that it is a surprise and is prejudicial. For example, the attorney opposing the amendment could argue that her preparation for trial and witness selection was based on the pleadings on file and that her trial strategy would have been different if she had known this relief was being sought. The party opposing the trial amendment must present some evidence of surprise or prejudice. *Texas Indus. v. Vaughan*, 919 S.W.2d 798, 803-4 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Usually the evidence of surprise or prejudice will come in the form of testimony from the attorney, a party or perhaps an expert witness. Attorneys must also remember to object to evidence if it relates to relief not disclosed in response to requests for disclosure.